Supreme Court, U.S.
FILED
[illegible] 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 1297

BOARD OF EDUCATION OF NETCONG, NEW JERSEY, *et al.*,

Petitioners,

vs.

STATE BOARD OF EDUCATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Petitioners,

v.

STATE BOARD OF EDUCATION, *et als.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered on November 9, 1970.

Citation to Opinions Below

The opinion of the Superior Court of New Jersey, Chancery Division, Morris County, declaring the Netcong prayer program unconstitutional and enjoining its further conduct is printed in Appendix B hereto and is reported at

108 N. J. Super. 564 (Chan. Div., 1970), 262 A. 2d 21. The opinion of the Supreme Court of New Jersey affirming the judgment of the Superior Court is printed in Appendix A hereto and is not yet reported in the official or unofficial reports.

Jurisdiction

The judgment of the Supreme Court of New Jersey, printed in Appendix A hereto, was entered on November 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The Questions Presented

1. Is a voluntary pre-school prayer program a permissible function under the First Amendment?

2. Is the decision below contrary to the decisions in the *Engel* v. *Vitale* and *School District of Abington Township* v. *Schempp* cases and the federal decisions that followed in the cases of *Reed* v. *Van Hoven* and *Stein* v. *Oshinsky*? (Citations *infra*.)

3. Should the *Engel* and *Schempp* decisions be revisited?

Constitutional Provision Involved

The constitutional provision involved is Article I, in addition to, and amendment of, the Constitution of the United States of America, which in the portion pertinent to this Petition, provides as follows:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; * * *."

Statement

This suit arises under the First Amendment of the Constitution of the United States. It involves the constitutionality of a voluntary pre-school prayer program conducted on the Netcong High School premises. The constitutional questions presented in this Petition were raised during the proceedings below in the following manner:

(a) The question concerning the constitutionality of a voluntary pre-school prayer program was first raised in the respondents' Complaint which issued out of the Superior Court, Chancery Division, upon an Order to Show Cause why the Netcong prayer program should not be declared unconstitutional and restrained. This question was further developed and presented to both courts below in petitioners' and respondents' briefs and on oral argument. The court of first instance declared the prayer program invalid and restrained its continuation or any implementation thereof. On appeal, that judgment was affirmed by the Supreme Court of New Jersey.

(b) The question of whether the cases of *Engel* v. *Vitale*, 370 U. S. 421 (1962) 82 S. Ct. 1261, 8 L. Ed. 2d 601, and *School District of Abington Township* v. *Schempp*, 374 U. S. 203 (1963), 83 S. Ct. 1560, 10 L. Ed. 2d 844 and *Murray* v. *Curlett*, 374 U. S. 203 (1963), 83 S. Ct. 1560, 10 L. Ed. 2d 844, should be revisited was first raised in the petitioners' brief on appeal to the Supreme Court of New Jersey. (The Supreme Court of New Jersey certified the appeal while it was pending before the Superior Court, Appellate Division.) This question is largely drawn into focus by the interpretation of the *Engel* and *Schempp* decisions as developed in the subsequent federal cases of *Reed* v. *Van Hoven*, 237 F. Supp. 48 (W. D. Mich., S. D. 1965) and *Stein* v. *Oshinsky*, 348 F. 2d 999 (2nd Cir. 1965).

The Supreme Court of New Jersey refused to come to grips with this issue.

The basic facts are is not in dispute. On September 10, 1969, the Board of Education of Netcong enacted the following resolution:

> "On each school day before class instruction begins, a period of not more than five minutes shall be available to those teachers and students who may wish to participate voluntarily in the free exercise of religion as guaranteed by the United States Constitution. This freedom of religion shall not be expressed in any way which will interfere with another's rights. Participation may be total or partial, regular or occasional, or not at all. Non-participation shall not be considered evidence of or recognizing an establishment of religion. The purpose of this motion is not to favor one religion over another nor to favor religion over non-religion but rather to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness and civic responsibility, to contribute to the general welfare of the community and to preserve the values that constitute our American heritage."

On September 16, 1969, the Board of Education of Netcong adopted the following supplementary resolution:

> "BE IT RESOLVED that the Superintendent of Schools be authorized, empowered and directed to implement the resolution creating a period for the free exercise of religion in whatever manner, in the exercise of his discretion, he considers best under the circumstances."

The formal school day at Neteong High School commenced at 8:05 a.m. The faculty was required to report to school by 8:00 a.m. and to have their homerooms available to students by 8:05 a.m. (warning bell). The supervision of homerooms began at 8:05 a.m.

A committee was specially formed to design a way to implement the foregoing resolutions. The committee was comprised of three students, one faculty member, the Superintendent of Schools, and the Neteong High School Principal. Upon the committee's recommendation, the program was designed and implemented as follows:

> Prior to the beginning of the school day, *viz.*, 7:55 a.m., the program commenced in the school gymnasium. The program began with the reading of the Chaplain's prayer from the United States Congressional Records which were maintained in the school library as a curriculum resource document. Anyone wishing to read a prayer could place his name on the reader's list which was maintained in the central office of the school. Thereafter his name, on request, would be placed at the bottom of the list, and in this fashion everyone was afforded an opportunity to conduct the exercise. The reader could select any prayer he desired and would first announce the date, volume, and page, citing the house of Congress from which the prayer was taken. After reading the Chaplain's prayer, he was allowed to add a "thought for the day" concerning such subjects as love of neighbor, brotherhood, and civic responsibility and ask for a moment of silent meditation. The thought of the meditation was left to the discretion of each participant. The program generally lasted two to four minutes and always terminated before 8:00 a.m. It was available to

all students and faculty members, however, there was no compulsion, pressure, or suggestion that anyone must or should attend. There was no prearranged seating and no roll call was taken or records kept. Those who did not wish to participate merely came to school as usual.

Student participation in the program numbered between 175 minimum to 300 students maximum. On September 30, 1969, the high school student enrollment numbered 317 students. Normally, about 230 students and about one-third of the faculty were in attendance. Participation by the faculty was on a parallel with the students; they possessed no official or regulatory status or duties.

On the 9th day of December, 1969, the plaintiffs sought and obtained from the Superior Court, Chancery Division, an Order to Show Cause returnable January 6, 1970, pursuant to which the petitioners were ordered to show cause why they should not cease and desist the aforesaid program. On February 9, 1970, the Superior Court rendered its decision enjoining and restraining the petitioners from a continuation of the program and any implementation thereof. The petitioners thereupon appealed to the Appellate Division of the Superior Court of New Jersey. On motion for certification to the Appellate Division, the appeal went directly to the Supreme Court of New Jersey. On November 9, 1970, the Supreme Court of New Jersey rendered its decision affirming the judgment of the Chancery Division but failed to answer any of the substantial question raised in appeal.

Reasons for Granting the Writ

This Petition raises substantial and important questions under the First Amendment of the Constitution of the United States. The decision below should be reversed because it directly conflicts with the decisions of this Court in *Engel* v. *Vitale*, 370 U. S. 421 (1962), 82 S. Ct. 1261, 8 L. Ed. 2d 601, and *School District of Abington Township* v. *Schempp*, and its companion suit, *Murray* v. *Curlett*, 374 U. S. 203 (1963), 83 S. Ct. 1560, 10 L. Ed. 2d 844, as they have been properly interpreted in *Reed* v. *Van Hoven*, 237 F. Supp. 48 (W. D. Mich., S. D. 1965), and *Stein* v. *Oshinsky*, 348 F. 2d 999 (2nd Cir. 1965). Additionally, the *Engel* and *Schempp* cases did very little to illuminate the future course of judgment on matters involving prayer exercises in public schools and left undecided substantial issues of far-reaching importance which must be resolved. This is evident by much that has been written on the decisions. They accomplished very little but have caused considerable confusion and uncertainty—even their results appear to conflict with the theme expressed in their *dicta*. It is therefore urgent that this Petition be granted.

I.

The *Engel* and *Schempp* cases involved First Amendment confrontations of government and religion on public school premises. In each case a prayer program was conducted in the classrooms during the school day. On both occasions the Court unnecessarily went far beyond the issues before it and espoused rhetoric *dicta* which has unsettled the law under the First Amendment and caused considerable confusion amongst the judiciary and bar throughout this country. Upon careful study of these decisions, it is clear that they have established standards which, if followed, constitutionally permit prayer pro-

grams to be conducted in public schools. Tersely stated, these standards are:

> (a) The State may not officially promulgate a prayer to be used in the school's curricular activities, and
>
> (b) There shall be no official coercion on the students to participate in a religious program during the prescribed school day.

A school prayer program obeying the admonishments of of these standards is within the permissible boundaries of religious exercises under the First Amendment. The prayer program implemented and conducted at Netcong High School was fashioned about the foregoing standards and truly compliments the First Amendment.

The basic policy question presented in this Petition is whether students may engage in a voluntary prayer exercise before or after the official school day. Although this question was not presented or answered in the *Engel* and *Schempp* cases, their rationale clearly spells out that this type of exercise is permissible. Yet, by reason of undue reliance upon and extension of the inconsistent surface intendments expressed in those decisions, they have been erroneously interpreted and twisted out of context. From their *dicta* there has been an effort to establish a new rigid neutrality to be observed by government in its constant interplay with religion. It was soon learned that such a concept of neutrality could not be practically applied. In the case of *Walz v. Tax Commissioner of the City of New York*, 397 U. S. 664 (1970), 90 S. Ct. 1409, 25 L. Ed. 2d 697, Chief Justice Burger observed this fact and noted that such a rigid neutrality could well defeat and dissipate the power of the purpose of the two clauses

of the First Amendment. At page 669 of the decision, Chief Justice Burger stated:

> "The general principle deductable from the First Amendment and all that has been said by the Court is this: That we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interferences."

Time and again, the Court has noted that the question is one of degree of involvement with religion and that:

> ". . . The measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *School District of Abington Township* v. *Schempp*, 374 U. S. 203 (1963), 83 S. Ct. 1560, 10 L. Ed. 2d 844, (Justice Goldberg's concurring opinion, page 308). See also *Walz* v. *Tax Commissioner of the City of New York, supra.*

The degree of involvement at Neteong was negligible—truly *de minimus.* It was made certain that the program obeyed the interdictions of the *Engel* and *Schempp* cases and the result was a valid prayer program substantially different from those presented in the *Engel* and *Schempp* cases. It is noteworthy to mention several of the essential differences which far remove the Neteong program from the area of constitutional contamination:

(a) The program was conducted before the opening of the official school day and, therefore, was taken outside of the hours during which the State requires compulsory

attendance. In *Engel* and *Schempp*, the programs were conducted during school hours.

(b) Student participation was optional. Students desiring to participate had to come to school in advance of the school day. They were required to do something not otherwise required of the student body. Non-participating students were not obliged to excuse themselves in front of the other students as in *Engel* and *Schempp*.

(c) Participation by teachers was on the same basis as student participation. Their presence also was optional.

(d) The program was conducted in the high school gymnasium and was purposely kept out of the homerooms. It was not implemented at the Netcong Grammer School since it had no available meeting place.

(e) The program was designed by a six member committee, comprised of three students, one faculty member, the Superintendent of Schools, and the high school principal. The format of the program was not directed by the Board of Education.

(f) Each volunteer student reader could choose whatever type of prayer he wished to read. The prayers were made available through the Congressional Record. The students could also speak on such subjects as love, brotherhood, civic responsibility, etc., and could ask for a moment of silent meditation. Each prayer was not necessarily of the same creed although all had one common link—the acknowledgment of a Supreme Being.

Mr. Justice Stewart in his dissenting opinions in the *Engel* and *Schempp* cases recognized the constitutionality of prayer programs such as the one at Netcong. He also noted that the majority of the Court did not, and as a matter of fact, could not hold that voluntary pre-school

prayer programs fell under the ban of the First Amendment. In his dissent in the *Schempp* case, Justice Stewart stated:

> "To be specific, it seems to me clear that certain types of exercises would present situations in which no possibility of coercion on the part of secular officials could be claimed to exist. Thus, if such exercises were held either *before* or *after* the official school day, or if the school schedule were such that participation were merely one among a number of desirable alternatives, it could hardly be contended that the exercises did anything more than to provide an opportunity for the voluntary expression of religious belief." (Emphasis supplied.) Page 318.

These sentiments were observed and pragmatically applied in federal decisions that followed. Perhaps the most significant is the case of *Reed* v. *Van Hoven*, 237 F. Supp. 48 (W. D. Mich., S. D. 1965) wherein the Court actually implemented a school prayer program which truly represented an accommodation of those wanting to pray and the admonishments of the First Amendment. In capsule form, the Court established a voluntary religious program to be conducted in the following manner:

(a) The program had to be conducted *before* the school day began or *after* it ended.

(b) It had to be in a room other than the students' regular homeroom.

(c) It had to be segregated from the official activity of the school.

(d) Readings were to be from historical documents.

(c) Those not sharing *the prayer* had to be free to contemplate anything which they desired. (Emphasis ours.)

The program escaped the evil of official inculcation of religious tenets and simultaneously was reconciled with the coercion standard. In balancing the competing interests under the two clauses of the First Amendment, the Court, at pages 56 and 57 of its opinion, stated:

> "In suggesting this plan, the Court is merely trying to arrive at an interim accommodation, having foremost in mind the natural, God-given rights of each parent to determine the course of religious education for his child, but also considering the fact that the present proposal of the school board does relate to a serious effort to reconcile divergent opinions in an area where rigid, dogmatic positions too often abound, with the effect that a problem of continuing importance results in increased misunderstanding and bitterness, a situation which must certainly be regretted by all, regardless of religious affiliation, or lack of it."

Again in 1965, the Second Circuit Court of Appeals recognized the constitutionality of a pre-school prayer program. *Stein* v. *Oshinsky*, 348 F. 2d 999 (2nd Cir. 1965). This suit involved an attempt by parents to enjoin the school from preventing prayer recitation by their children. The Court had to resolve whether the school was required to permit students to engage in a religious exercise during class and thus did not come to grips with the substantive question presented in this Petition. Nevertheless, the Court acknowledged the validity of the plaintiffs' argument that the *Engel* and *Schempp* cases did not hold that a state could not permit students to engage

in oral prayer provided that it was said before or after school hours. The Court said at page 1682 of its opinion:

> "The authorities acted well within their powers in concluding that plaintiffs must content themselves with having their children say these prayers *before nine* or *after three*; their action presented no such inexorable conflict with deeply held religious belief as in Sherbert v. Verner, supra." (Emphasis added.)

The decisions in *Reed* and *Stein* were undoubtedly influenced by the illuminating dissent of Justice Harlan in *Sherbert* v. *Verner*, 374 U. S. 398 (1963), 83 S. Ct. 1970, 10 L. Ed 2d 965. What is important here is that Justice Harlan concurred with the majority opinion in both the *Engel* and *Schempp* cases, and his dissent in the *Sherbert* case was rendered in the same year as the *Schempp* decision. In the course of his dissenting opinion, he explained what was really meant by the *Engel* and *Schempp* decisions. In pertinent portion, he observed that:

> "The constitutional obligation of 'neutrality' . . . is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be chartered, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all embracing secularism. The State violates its obligation of neutrality when, for example, it *mandates* a daily religious exercise in its public schools, *with all the attendant pressures* on the school children that such an exercise entails. See *Engel* v. *Vitale*, 370 U. S. 421; *School District of Abington Township* v. *Schempp*, *supra*." Pages 422 and 423. (Emphasis ours.)

The prayer program at Netcong High School is not a daily exercise mandated by the school board and does not possess the feature of coercion. It merely affords an opportunity for students to congregate in a convenient room, other than their classrooms, prior to the official school day in order to read a prayer, speak on love, brotherhood, and civic responsibility, and to meditate as each desires. The program would be ineffectual and eventually fall into oblivion if it were not for the voluntary participation of the students. It is the students, not the school, who vivify the program.

The decision of the New Jersey Supreme Court, below, found that there was no "meaningful" difference between Netcong's program and those discussed in *Engel* and *Schempp*. Very little significance can be attached to that decision, for the Court, although willing to acknowledge that there were differences between the programs, for some inexplicable reason, sought to avoid a resolution of the pervasive and ever pressing issue of voluntary school prayer. Surely, the Netcong program presents no genuine nexus between the conduct of such an exercise and the establishment of religion. "A page of history is worth a volume of logic." *Walz* v. *Tax Commissioner of the City of New York*, 397 U. S. 664 (1970), at pages 675 and 676. Petitioners ask this Court to restore the essence of that history.

II.

Seldom were there areas in constitutional law in need of clarification as urgently as that presented in this Petition. Numerous federal and state court decisions, Attorney Generals' opinions, opinions of school boards of education, legislators, and the public in general clearly illustrate the doubt and confusion engendered by the

Engel and *Schempp* decisions. When squarely confronted with voluntary pre-school prayer exercises, the judiciary has confidently upheld their constitutionality, the decision of the lower courts in the instant case excepted. See *Reed* v. *Van Hoven*, 237 F. Supp. 48 (W. D. Mich., S. D. 1965); *Stein* v. *Oshinsky*, 348 F. 2d 999 (2nd Cir. 1965). Yet, in cases which did not clearly present that question, there has been a divergent expression of views. See *Sullivan* v. *Ainsworth*, Superior Court, Mass. (Equity, March 31, 1970)—not reported; *Opinion of the Justices*, 108 N. H. 97, 228 A. 2d 161 (Sup. Ct. 1967); *DeSpain* v. *DeKalb County Community School District*, 384 F. 2d 836 (7th Cir. 1968).

During March, 1966, the late Senator Everett Dirksen introduced to the Senate a constitutional amendment to eliminate the confusion over prayer and Bible reading in public schools. The resolution, sponsored by 47 Senators, would have permitted the voluntary participation by students or others in prayer. On September 21, 1966, the sponsored amendment, in a 49 to 37 vote, fell 9 votes short of the two-thirds majority required for the passage of a proposed constitutional amendment, thereby failing to rectify the ambiguities of the *Engel* and *Schempp* cases. Such legislative endeavors aside, it is the judiciary's primary obligation to clarify the law which it has put it doubt. A favorable resolution of this Petition is the first step towards eliminating that doubt and restoring the public's confidence in the flexibility and strength of our Bill of Rights. A refusal in this regard will certainly generate hostility and disrespect and may eventually lead to the demise of the basic purpose of the First Amendment.

III.

Analytically and practically, the *Engel* and *Schempp* cases were wrongfully decided. Not only did they put the law into disarray, but what is more troublesome is the apparent conflict between the results attained and their judicial espousals. No less important is the fear that has been generated by their *dicta*. Thoughtless application of that *dicta* could produce unfortunate results, *e.g.*, potential judicial straight jacketing of such a degree that all theistic religions would be placed at an artificial state created disadvantage; doubt and even denial of God's existence; the eventual demise of a meaningful First Amendment. Accordingly, the growth and extension of such decisions, and particularly their *dicta*, if viable, must be properly restricted in logic.

Decisions unworthy of judicial continuance should not be allowed to develop and expand. The Court has an obligation to narrowly confine such decisions, and if that is not feasible, then to overrule them in order to establish a more meaningful and workable definition. *Sherbert* v. *Verner*, 374 U. S. 398 (1963), 83 S. Ct. 1790, 10 L. Ed. 2d 965 (dissent of Justice Harlan at pages 418, 421); *Girouard* v. *United States*, 328 U. S. 61 (1945) 66 S. Ct. 826, 90 L. Ed. 1084. Today the Court is given the opportunity to constrict the scope of the *Engel* and *Schempp* decisions and to expand the constitutional privileges inherent in the First Amendment. Let us review the basic error and misconception of the *Engel* and *Schempp* decisions which should be rectified upon the granting of this Petition.

Traditionally, the concept of neutrality allowed government to acknowledge the existence and sovereignty of God but forbade partiality as amongst the various theistic creeds or the coercion of any, believers or not. See *Rice*—

Supreme Court and Public Prayer, (The Need for Restraint), Fordham University Press, New York, 1964. Thus, under appropriate circumstances, government was permitted to prefer the theistic creeds over the religion of non-believers in those countless areas in public life where the two often met on uncompromising grounds. The constitutional rights of non-believers, although not in accord with the majority, must necessarily remain inviolate. However, we must keep foremost in mind that:

> "We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 342 U. S. 306 (1952), 72 S. Ct. 679, 96 L. Ed. 954,

and that the non-believer:

> "lives in a country where theism is in the warp and woof of the social and the governmental fabric and he has no authority to eradicate from governmental activity every vestige of the existence of God." *Doremus* v. *Bd. of Education of Hawthorne*, 5 N. J. 435 (1950) page 439.

By affirming our character as a nation under God, we are affirming the transcendence of religious faith in America's heritage and future and shall be constantly strengthening those spiritual weapons which forever will be our country's most powerful resource.

The concept of religion, as from time immemorial, presupposed the existence of a Supreme Being; it was a theistic and not a non-theistic belief. The essence of religion is the relation of the individual to his Creator and to the duties thereby imposed and of obedience to His will. *Davis* v. *Beason*, 133 U. S. 333 (1890), 10 S. Ct. 299, 33 L. Ed. 637. As a matter of fact, the Supreme Being is the essence of all religious sects. *State* v. *Dist. Bd. of*

School Dist. No. 6 of Edgerton, 76 Wisc. 177 (1890), 44 N. W. 967.

Proceeding upon the foregoing concept of religion, neutrality under the First Amendment was capable of practical application. Currently, however, the surface intendments of the *Engel* and *Schempp* decisions, if accepted at face value, would seem to expand the doctrine of neutrality to a degree which is pragmatically impossible of attainment. The wholesome rigid neutrality of which the Court spoke, and which has recently been restricted to a benevolent neutrality, seemingly requires government to be neutral as between all theistic creeds on the one hand and those who profess no belief on the other hand. In effect, government must walk a tight rope between the two. While in the process of expounding this doctrine, the Court effectively excised God from public schools, and in potential measure, from public life. This interdiction represents a judicial substitute for the traditional theistic premise of a new agnostic premise entailing a perpetual suspension of judgment on the part of government as to the existence of God. This undesirable position, if accepted, results in the approval and support of a religious tenet which albeit shared by few people, is nevertheless their religion—agnosticism. Such governmental favoritism of religion, although it may not have been intended, is the very thing that the *Engel* and *Schempp* cases sought to avoid. The decisions unquestionably produce a result which clashes with their surface intendments—a result which is thereby unconstitutional.

It thus becomes imperative to confine this interdiction, while still possible. If this is not done, it will surely lead to a dogmatic interdiction against government conduct or sponsorship of religious exercises far more rigid than anything heretofore conceived. The logical implications of

these decisions, if not repulsed, will imprison the Court in its own logic, and the American people will slowly lose those cherished religious elements of public life enjoyed for centuries.

The loud voice of silence produced by these decisions will tell the students that religion cannot be very important because it is not even mentioned in school. Such a negative outlook necessarily flows from the refusal to recognize religion—that religion is negligible, unimportant, and does not have a proper place in society. This concept should not be allowed to develop; it is absolutely untrue.

The *Engel* and *Schempp* cases must therefore be revisited and analyzed and appropriate judicial action taken in order to rectify the unintended consequences that have arisen in their wake.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Opinion of the Supreme Court of New Jersey

(Filed—November 9, 1970)

STATE BOARD OF EDUCATION, *et al.*,

Plaintiffs-Respondents,

vs.

BOARD OF EDUCATION OF NETCONG, NEW JERSEY, *et al.*,

Defendants-Appellants.

Argued October 26 and 27, 1970—Decided November 9, 1970.

On Appeal from the Superior Court of New Jersey, Chancery Division, Morris County.

• • •

PER CURIAM.

This case involves a school prayer program instituted by the Board of Education of Netcong. The trial court held that the program violated the Church-State provision of the First Amendment to the Constitution of the United States and accordingly enjoined the Board from continuing its program. 108 N. J. Super. 564 (Ch. Div. 1970). We certified the Board's appeal before it was heard in the Appellate Division.

Appendix A

We find no meaningful difference between the program involved in this case and the programs which the United States Supreme Court held to violate the Establishment Clause of the First Amendment in *Engel* v. *Vitale*, 370 U. S. 421, 8 L. Ed. 2d 601 (1962), and *School District of Abington Twp.* v. *Schempp*, 374 U. S. 203, 10 L. ed. 2d 844 (1963). The judgment is therefore affirmed.

APPENDIX B

Opinion of the Superior Court of New Jersey, Chancery Division, Morris County

(Filed—February 9, 1970)

STATE BOARD OF EDUCATION, *et al.*,

Plaintiffs,

vs.

BOARD OF EDUCATION OF NETCONG, NEW JERSEY, *et al.*,

Defendants.

Decided: February 9, 1970

STAMLER, (JOSEPH H.) J.S.C.

Plaintiffs are the State Board of Education, (hereinafter, "State Board"), the Commissioner of Education and the Attorney General of New Jersey. Defendants are the Netcong Board of Education (hereinafter, "Netcong Board"), the Superintendent of Schools of Netcong and the Principal of the Netcong High School. Plaintiffs seek a declaratory judgment that a certain resolution and the implementation thereof are in violation of the United States Constitution and the Constitution of the State of New Jersey. A permanent injunction is demanded. Defendants assert that plaintiffs have no standing to seek relief and that what they have done is not proscribed by law.

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The parties have stipulated that the State Board of Education bears the responsibility for the general supervision and control of public education in this State. In furtherance of this responsibility, the State Board has the power to make and enforce rules implementing and carrying out the school laws of this State and has all other powers, in addition to those specifically provided by law, requisite to the performance of its duties. The Commissioner of Education has supervisory power over all schools of this State receiving support or aid from state appropriations and is responsible for the enforcement of all rules prescribed by the State Board. The Attorney General is responsible for the enforcement of the provisions of the Constitution and all other laws of this State, and of the Constitution of the United States as interpreted by the courts.

On September 2, 1969, the Neteong Board enacted the following resolution:

> "That the Superintendent be instructed by the Board of Education to institute prayers in the Neteong Schools, forcing no student to pray if unwilling but denying no student the right to pray, details to be worked out by the Board of Education."

It was further resolved that:

> "Members of the clergy from the communities of Neteong and Stanhope be invited to meet with representatives of the Board of Education and *compose a suitable prayer for the Board's consideration.* In the interim, the Superintendent is instructed to institute 30 seconds of silent meditation until the Board takes further action." (Emphasis supplied)

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On September 10, 1969, the Neteong Board rescinded its resolution of September 2 and enacted the following:

> "On each school day before class instruction begins a period of not more than five minutes shall be available to those teachers and students who may wish to participate voluntarily in the free exercise of religion as guaranteed by the United States Constitution. This freedom of religion shall not be expressed in any way which will interfere with another's rights. Participation may be total or partial, regular or occasional, or not at all. Non-participation shall not be considered evidence of non-religion, nor shall participation be considered evidence of or recognizing an establishment of religion. *The purpose of this motion* is not to favor one religion over another nor to favor religion over non-religion but rather *to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness and civic responsibility, to contribute to the general welfare of the community and to preserve the values that constitute our American heritage.*" (Emphasis supplied)

On September 16, 1969, the Neteong Board adopted the following supplementary resolution:

> "BE IT RESOLVED that the Superintendent of schools be authorized, empowered and directed to implement the resolution *creating a period for the free exercise of religion* in whatever manner, in the exercise of his discretion, he considers best under the circumstances." (Emphasis supplied)

The implementation of the resolution has occurred in the following way: At 7:55 a.m. in the Neteong High

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School gymnasium, immediately prior to the formal opening of school, students who wish to join in the exercise either sit or stand in the bleachers. A student volunteer reader, assigned by the principal on a first come, first serve basis, then comes forward and reads the "remarks" (as described by defendants) of the Chaplain from the Congressional Record, giving the date, volume, number and body whose proceedings are being read. The selection of material to be read is made by the volunteer reader, with the approval of the high school principal in a purely ministerial manner to insure that the material used complies with the avowed purposes of the Board's resolution. The volunteer reader is free to add remarks concerning such subjects as love of neighbor, brotherhood and civic responsibility. At the conclusion of the reading, the students are asked to meditate for a short period of time either on the material that has been read or upon anything else they desire.

In October 1969, the Commissioner of Education requested an opinion of the Attorney General as to whether the resolution of the Netcong Board and the implementation thereof conformed with the provisions of the First Amendment to the United States Constitution. On November 24, 1969, the Attorney General rendered to the Commissioner a formal opinion which concluded that the resolution of the Netcong Board and the implementation thereof violate the First Amendment to the Constitution of the United States. On November 26, 1969, a copy of the Attorney General's opinion was mailed to the attorney for the Netcong Board at the attorney's request.

On December 1, 1969, the Commissioner sent a telegram to the Netcong Board calling upon it to rescind the resolution and to cease and desist from all practices pursuant thereto.

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On December 2, 1969, the Neteong Board met in regular session and resolved to maintain both the resolution and the implementation thereof in the Neteong Schools, notwithstanding the opinion of the Attorney General and the directive of the Commissioner of Education.

On December 3, 1969, the State Board unanimously authorized and called upon the Attorney General to take legal action.

On December 4, 1969, the Commissioner received a letter from the secretary to the Neteong Board reiterating the position which the Neteong Board took on December 2, 1969 and stating, in part, that:

> ". . . until such time as the constitutionality of or program has been judicially determined, we cannot consider our program to be in violation of the law of the land, notwithstanding our respect for the Attorney General and his office."

On December 5, 1969, the State Board sent a telegram advising the Neteong Board of its December 3, 1969 decision to start suit.

On December 9, 1969 a verified complaint was filed, and an order to show cause issued. The court's suggestion that the matter be considered on the return day as cross-motions for summary judgment on stipulated facts was accepted by all counsel.

Without objection from either side the court received the *amicus* brief of the "In God We Trust Committee", the Tenth District (Morris County) of V.F.W. (Veterans of Foreign Wars), the Morris County Conservative Club, Morris County American Legion, West Morris "T.R.A.I.N."

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(Time to Restore American Independence) Committee and the Essex County Conservative Club.

At the outset defendants argue that the State Board, the Commissioner and the Attorney General have no standing to bring this action. The lack of standing, it is urged, arises from expressions in *Everson* v. *Board of Education*, 330 U. S. 1, 18 (1946) and in *Sherbert* v. *Verner*, 374 U. S. 398 (1963) in which the states are admonished to take a neutral position in their relations with groups of believers and non-believers in matters of religion.

Defendants assert that taxpayers of Netcong or parents of a child attending Netcong High School are the only proper parties plaintiff. This would require one segment of the small community to engage in heated controversy with another segment and be forthwith labelled not as litigants, but as "Anti-God", "Anti-Christ" or "Communists". Telegrams and letters were sent to the Court during the pendency of this litigation which clearly and depressingly set forth the temper of the community and the eagerness of certain "citizens" to create division, diversion and prejudice.

However, this Court in determining the status of plaintiffs in the instant action cannot and will not be influenced in any way by the telegrams, letters or labels. The law, and not the public clamour or fear thereof, is the polestar.

Where standing is placed in issue, the question is whether the person whose standing is challenged is a proper party to such an adjudication of a particular issue and not whether the issue itself is justiciable. *Flast* v. *Cohen*, 392 U. S. 83, 99 (1968).

The State Board has supervision and control of public education (N.J.S.A. 18A:4-10) and is obliged to make and

enforce regulations for implementing and carrying out the school law of this State. (N.J.S. 18A:4-15). The Commissioner is constrained to enforce all rules prescribed by the State Board. (N.J.S. 18A:4-23). The Attorney General must enforce the provisions of the United States Constitution, the New Jersey Constitution and all other laws of the State. (N.J.S. 52:17A-4).

The United States Constitution, Article VI cl. 3, states in pertinent part "* * * all executive and judicial officers both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; * * *."

The members of the State Board, the Commissioner and the Attorney General have taken the required oath. (N.J.S. 41:1-2).

In *Sills* v. *Hawthorne Board of Education*, 84 N. J. Super. 63 (Ch. Div. 1963), aff'd. 42 N. J. 351 (1964), the Attorney General and the State Board of Education sought and were granted injunctive relief against a local board in a case involving compulsory prayer in school. This court is advised that the standing of plaintiff to sue was fully briefed. However, neither the trial court nor the Supreme Court saw fit to comment. It must be assumed that no affirmance would have been forthcoming had our Supreme Court not recognized the Attorney General and the State Board as proper parties plaintiff.

In the performance of the duties imposed upon him, the Attorney General has been described as the "defender of the public interest." *Public Service Co-ordinated Transport* v. *State*, 5 N. J. 196, 208 (1950). See also *Alexander* v. *New Jersey Power & Light Co.*, 21 N. J. 373 (1956).

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In *Wilentz* v. *Hendrickson*, 133 N. J. Eq. 447, 455 (Ch. 1943), aff'd. 135 N. J. Eq. 244 (E. & A. 1944), the court noted:

> "In *Attorney-General* v. *Delaware and Bound Brook Railroad Co.*, 27 N. J. Eq. 631, Dixson, J., remarked: 'In equity as in the law court, the Attorney-General has the right in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit, by what may be called civil information, for their protection. *The State is not left without redress in its own courts because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer on whom it has cast the responsibility and to whom, therefore, it has given the right of appearing in its behalf and invoking the judgment of the courts on such questions of public moment.*'" (Emphasis supplied)

It cannot be doubted that this case is one of "public moment". Although they are not named parties to this action, the children of the State who attend public schools are the ones most affected by whatever the determination of this court may be. Traditionally, the State has a legitimate interest in protecting the welfare of its children. In *Prince* v. *Massachusetts*, 321 U. S. 158, 168 (1943) the Supreme Court said:

> "The state's authority over children's activities is broader than over like actions of adults. What may be wholly permissible for adults may not be so for children."

Our legislature has declared by statute what the courts for many years have held: Children are the wards of the State. In N.J.S. 2A:4-2 the following appears:

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> "It is hereby declared to be a principle governing the law of this state that children under the jurisdiction of said court are wards of the state, subject to the discipline and entitled to the protection of the state, which may intervene to safeguard them from neglect or injury and to enforce the legal obligations due to them and from them."

To urge, as defendants do, that the State is precluded from access to the courts in seeking a judicial determination in matters involving "religion" or "non-religion" would place the issue in the streets, and this nation would then become a government of men and not of law. It is concluded that plaintiffs have standing.

In issue is the application of the First Amendment to the United States Constitution to the program undertaken by defendants. In relevant part the First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

It is well settled that the First Amendment is applicable to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

Plaintiffs argue that applicable decisions of the United States Supreme Court lead inductably to the conclusion that the resolution of the Netcong Board and the subsequent implementation thereof are unconstitutional because such action is the "establishment of religion" as defined by the Court. Defendants' position is that the program is either "free exercise" of religion or not a religious exercise at all. In one part of their brief defendants say:

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> "Although plaintiffs' statement of facts demonstrates its knowledge that the free exercise of religion program at Netcong High School is comprised of a period of silence, or meditation, its brief fails to separate these two aspects in its legal arguments. Without in any manner conceding the validity of the State's contentions that reading from the Congressional Record may be an unconstitutional infringement upon the First Amendment, defendant [sic] acknowledges that the issue might at least be open to reasonable argument. However, the same cannot be said for an attack upon the meditation aspect of the program."

With regard to meditation in schools without more, Professor Paul A. Freund, a noted commentator on religion and the law, has said:

> "Nor does any decision, in my judgment, prevent a public school class from engaging in a moment of silent meditation or reverence, as the teachings of the individual spirit or inheritance may prompt." *Freund, Religion and the Public Schools, The Legal Issue*, (Harvard University Press, 1965).

Mr. Justice Brennan in *School District of Abington Twp. v. Schempp*, 374 U. S. 203 (1963), by way of dictum said at p. 281:

> "It has not been shown that * * * the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of sep-

aration between its spheres of religion and government." (374 U. S. at 381, 10 L. ed. 2d at 891).

Such a program of silent meditation by itself may give the child the opportunity to reflect on the morning or breakfast prayer in which he and his father participated at home before school or to contemplate the sermon in the house of worship which he and his family attend the preceding Saturday, Sunday or evening. The Netcong Board, by directing the wedding of meditation and a religious reading, must believe that the parents of its students of their respective spiritual advisers are incapable of providing their children with something sufficiently worthwhile upon which to meditate.

For the purpose of a determination of the issues before this court, the program of the Netcong Board cannot be considered in separate and divisible parts. Although the children are asked to meditate either upon the "remarks" read from the Congressional Record or upon anything else they desire for a short period of time, such reading is an integral part of the entire program and no child is invited solely for the meditation period. To be in attendance for only the meditation, a child must walk in at the beginning of or during or immediately at the conclusion of the reading, forthwith identifying his late arrival as unwilling to listen to the reading. He might just as well have meditated on the school steps or absented himself entirely until regular classes were ready to begin.

It is plaintiffs' position that the program violates the Establishment Clause. Defendants state that it is permissible either as a religious activity within the Free Exercise Clause, or alternatively should be considered as

a secular educational program "to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness and civic responsibility to contribute to the general welfare of the community and to preserve the values that constitute our American heritage." (*Netcong Board Resolution*, September 10, 1969). This latter position suggests a laudable and purely secular purpose.

There is an absolute duty of public schools to teach to our youth honesty, cooperativeness and truthfulness and to impart sound moral consciousness and other virtues. If this is the prime purpose of the Netcong Board and the Netcong program is in no way a religious exercise, why then should any student be permitted to absent himself from so important a part of the educational process, something that should be common and compulsory for all children in the public schools? Permissive non-attendance in a vital school program is not consistent with secularity.

The earnestness of this position is questioned when defendants on argument described the rescission on September 10 of the non-denominatorial prayer Resolution of September 2 as resulting from a realization of the Netcong Board of the "error of their ways". This was followed at the same meeting by passage of the Resolution here under consideration. The flaw in the non-religious argument becomes more apparent when the introductory language of the Resolution is considered:

> "On each school day before class instructions begins, a period of not more than five minutes shall be available for those teachers and students who may wish *to participate voluntarily in the free exer-*

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> *cise of religion* as guaranteed by the United States Constitution." (*Resolution* September 10, 1969). (Emphasis supplied)

If the Noteong program is truly a secular activity, there is no Establishment infringement. If it is in fact a religious exercise, then the paradox which troubled Mr. Justice Brennan in *Abington*, *supra*, comes into play. At p. 247 of 374 U. S. he said:

> "[A]n increasingly troublesome First Amendment paradox [is] that the logical inter-relationship between the Establishment and Free Exercise Clauses may produce situations where an injunction against an apparent establishment must be withheld in order to avoid infringement of rights of free exercise."

Professor Alan Schwarz concludes in a recent *Yale Law Journal* article that Mr. Justice Brennan, in the same opinion, endorses this guideline:

> ". . . the standard would permit the *prima facie* evidence of a violation represented by any assistance to religion to be overcome by proof that the purpose of the aid was to protect free exercise, whether or not such protection is constitutionally required." Schwarz, "No Imposition of Religion: The Establishment Clause Value," 77 *Yale L.J.* 692, 707 (1968).

For the most part the parties rely on precisely the same United States Supreme Court decisions, but their respective interpretations differ. Equating its own interpretations of the United States Constitution with the document

itself and requiring a reading of the document itself as if it contained a physically interlineated printed translation taken from its opinions, the United States Supreme Court said in *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958):

> "Every state legislator and *executive* and *judicial* officer is solemnly committed by oath, taken pursuant to Article VI, cl. 3, to 'support *this Constitution.*'" (Emphasis supplied.)

In the United States Supreme Court the doctrine of *stare decisis* has never enjoyed high potency, historically or theoretically, in cases of constitutional interpretation. *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932). (Dissenting opinion of Brandeis, J.) Within our judicial system, however, there is an absolute duty, an obligation of obedience, imposed on trial courts to apply the law as last pronounced by superior judicial authority. A trial court cannot claim the right to an independent interpretation of the United States Constitution, and a constitutional challenge is said to be "insubstantial" when the same question has been previously adjudicated by the Supreme Court. *California Water Service Co.* v. *City of Redding*, 304 U.S. 252 (1958); *Ex parte Poresky*, 290 U.S. 30 (1933).

The obligation to follow judicial precedent is present only when the rule of decision is clear. Both plaintiffs and defendants herein argue that it is well settled in favor of their respective adversary positions.

The *amicus* brief of the "In God We Trust" *et als.* Committee urges this court to "overrule" the Supreme Court because it failed to properly consider the genesis of the First Amendment and because there exists an

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"overwhelming public sentiment" nationally in favor of prayer in school. In support of these positions, attention is directed by *amicus* to the dissenting opinions of the Justices of the United States Supreme Court in various "establishment" and "*free exercise*" cases and to public opinion polls, such as Gallup, Harris and Good Housekeeping polls, one of which purports to show that 82% of the public favors prayer in public schools. The validity of such "overwhelming sentiment" is questionable. For example, the General Assembly of the United Presbyterian Church (judicially noted to represent a large number of Americans) takes a position directly contrary to the In God We Trust Committe. In 1963 the General Assembly of the United Presbyterian Church passed the following Resolution:

> "The 175th General Assembly
>
> 'Gives thanks to God for the cival procedure termed "due process of law", which provides for orderly resolution of social conflict. We affirm the indispensable role of the Supreme Court of the United States in this process. While responsible criticism of the Court's opinion is within the tradition of our nation, we are out of sympathy with the kind of criticism which impugns the integrity of the highest court of the land.
>
> "Records its endorsement of the principle laid down by the Supreme Court in the Regent's prayer case (Engel versus Vitale, June 25, 1962) that 'in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government' . . .

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"Reminds the church that the development and practice of Christian worship is the inescapable obligation of the congregation and the family, and not of the public schools.

"Warns the church of an all-too-human tendency to look to the state and its agencies for support in fulfilling the church's mission. Such a tendency on the American scene endangers true religion as well as civil liberties. Consequently, this General Assembly calls the church to renewed worship, study, work, and sacrifice to fulfill its mission as God's people in the world." *Presbyterian Life*, Vol. 22, number 22, p. 14 (November 15, 1969).

Assuming *arguendo* that there is such "overwhelming sentiment", it is certain that the Nutcorn High School history or civics text books would tell our friends of court (*amicus*) that the available procedure for constitutional amendment is through the legislative and not the judicial branches of government. Surely, good citizens who believe that it is "Time To Restore American Independence" have learned why the Founding Fathers made it more difficult to amend the Constitution than by the simple majority requisite for "everyday" legislation. This was to protect the minority; if it were otherwise, the Bill of Rights, which includes the First Amendment, would have become subject to repeal by a simple majority.

In urging that "the avowed disruptive purpose of a minority voice be not allowed to further injure the moral foundation of our country and society", the *amicus* brief cites and quotes only the minority voices of the Supreme Court.

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True concern for the moral well-being of our youth is expressed by both *amicus* and defendants. At the same time, by adoption of the September 10 resolution as the substitute for a non-denominational prayer resolution (September 2), defendants do not encourage in the youth of Netcong correction by proper legal procedures of an alleged wrong, but rather by scheme and subterfuge foster an avoidance of "moral consciousness and civic responsibility" and an evasion and erosion of "the values that constitute our American heritage". (The last two quoted phrases are taken from the September 10 resolution.)

Defendants say that "prayers" are not being read to the students; they say that the readings from the Congressional Record are simply "remarks" and not a "religious exercise" or "prayer", notwithstanding that words read are the words of the Chaplain or visiting clergyman.

It is true, as plaintiffs assert, that the United States Supreme Court has time and again stated that any act of an agency of government at any level which has the effect of establishing or imposing religion is forbidden. It is also true, as defendants posit, that our highest court has time and again held that no agency of government may interfere with the free exercise of religion. But the guidelines are not so distinct that a given set of distinguishable facts can be deemed to foreclose a trial court determination.

This court must first determine whether there is a violation of the Establishment Clause and if there is no violation, then there is no case for plaintiffs. If there is an establishment, next to be considered is whether there is

an interference with free exercise of religion. If there is both establishment and interference, which must be subordinated in the head-on confrontation? This adjudicatory process is consistent with the balancing approach suggested by Mr. Justice Brennan, who in *Abington, supra*, indicated that *prima facie* evidence of aid in establishment might be overcome by proof that the purpose of the aid was to protect free exercise.

The Netcong program is not saved from the establishment bar by the permissive attendance feature.

Defendants, using intemperate and unwarranted adjectives to describe the Justices who comprised the majority of the Supreme Court in recent First Amendment "religion" cases, characterize court views as based upon a recently concocted, ultra-liberal construction of our Constitution. Eighty years ago the Wisconsin Supreme Court considered objections from a group of Catholic parents to the reading from the King James Bible in public schools. There, as in the case at bar, attendance of the children was not compulsory. The entire court agreed that the practice violated the Constitution. *State* v. *District Board of School District No. 8 of Edgerton*, 76 Wisc. 177, 180, 44 N.W. 967, 975 (Wisc. Sup. Ct. 1890). Although unanimous in its judgment, three separate concurring opinions were filed. In writing for the court, Justice Lyons said at p. 975 of 44 N.W.:

> "The answer of the respondent states that the relators' children are not compelled to remain in the schoolroom while the Bible is being read, but are at liberty to withdraw therefrom during the reading of the same. For this reason it is claimed that the relators have no good cause for complaint,

> even though such reading be sectarian instruction. We cannot give our sanction to this position. When, as in this case, a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others."

This view was restated with approval in the United States Supreme Court twenty-two years ago in the "released time" case, *McCollum v. Board of Education*, 333 U. S. 203, 227 (1948).

In *Engle v. Vitale*, 18 Misc. 2d 659, 191 N. Y. S. 2d 453 (N. Y. Sup. Ct. 1959), the trial court upheld "the New York Regent's non-denominational prayer", but to do so it required school authorities to promulgate regulations to assure that participation would be entirely voluntary and that non-participation would not be penalized, suggesting for example a regulation which would permit non-participating pupils to arrive after the exercises. This twenty-two word prayer, requiring less than 10 seconds of reading time, is as innocuous, non-sectarian and universal as could possibly be formulated. One commentator has described the prayer as a "to whom-it-may-

concern" prayer. Affirmed in the New York Court of Appeals by a 4-3 vote, the case was appealed to the United States Supreme Court. In a 6-1 decision (two Justices not participating), the Supreme Court reversed. *Engle v. Vitale*, 370 U. S. 421 (1962):

> "There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' *prayer is 'non-denominational'* and the fact that the program, as modified and approved by the state courts, does not require all pupils to recite the prayer *but permits those who wish to do so to remain silent or be excused from the room*, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment." 370 U. S. at 431.

The school board, the principal and a teacher required by law to be in attendance all approve of the Netcong program, either tacitly or explicitly; their recommendation of the program clearly influences attendance. Here there is ever-present peer pressure and certainly an aura of Board, superintendent, principal and teacher acceptance. Public schools, unlike the halls of Congress, present a special case. This audience is without the maturity to ex-

press independence and is indeed captive when pupils are obliged to identify themselves by allegiance or withdrawal from the "program". (See *Abington, supra*, opinion by Justice Brennan, 374 U. S. at p. 298-300.) Certainly voluntary participation does not support defendants' position.

Is it a religious exercise to read the "remarks" of the Chaplain? Are they truly and simply secular remarks? Received as an exhibit at the hearing were copies of The Congressional Record from October 1, 1969 through December 9, 1969. The Congressional Record generally begins: "The Chaplain, the Reverend ————, offered the following *prayer*." (Emphasis supplied) From October 1, through December 9, 1969, the text of the Congressional Record includes quotations by the various chaplains from Romans, Deuteronomy, Ephesians, Isaiah, Samuel, Lamentations, Corinthians, Proverbs, Thessalonians, John, Matthew, Chronicles, Peter and, on sixteen separate occasions, from Psalms. With respect to reading from the Bible, the trial court found in *Abington* that the reading of Bible verses, even without comment, constitutes a religious exercise. In the Congressional Record where biblical quotations are used, they are followed as well by the prayers of the individual clergyman. Further, when the Bible is not quoted by a chaplain, the "remarks" set forth in the Congressional Record consist exclusively of a prayer. Each chaplain commenced his invocation with the words "O God", "Eternal God", "Eternal Father" or the like, and ended with the word "Amen". In each instance it clearly appears that there has been a "solemn avowal of divine faith and supplication for the blessings of the Almighty." (Quotation from *Engle, supra* at p. 426).

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If the Regents' Prayer may not be read in the public schools, it must follow that the readings of "remarks" from the Old Testament and the New Testament must be an imposition or establishment violation, for the necessary consequence of *Engle* is that any devotional reading is unconstitutional.

To call some of the beautiful prayers in The Congressional Record "remarks" for a deceptive purpose is to peddle religion in a very cheap manner under an assumed name. This type of subterfuge is degrading to all religions.

This does not mean that the Bible may not be read or studied as a work of literature, even though a reading or study may cause some to accept or reject it from a religious standpoint. The study of the Bible in a Literature course, the study of the Congressional Record in a Civics or Government course, or of Washington's Farewell Address or the Northwest Ordinance in a History class is not proscribed to public school students, even if a by-product of this secular activity is harmful or beneficial to a particular religion. And, of course, there is no restraint upon parents or guardians who inculcate a specific religion in youth in the proper place and at the proper time. To hold otherwise would undermine the family's right to determine the religious or non-religious beliefs of its members, especially its children. Our American heritage, which defendants seek to preserve, has embodied the legitimate interest in implementing and encouraging the exercise of that private choice to the extent of making religion or non-religion a private affair. Privacy and complete freedom of choice is the core establishment value.

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Direct imposition of religion by governmental action is *per se* unconstitutional. Indirect establishment can be condoned where it is the only means of obtaining an absolutely compelling and otherwise unobtainable secular goal. In considering the paradox expressed by Mr. Justice Brennan in *Abington, supra*, the principle of free exercise will be held superior where the imposition or establishment danger is indirect and insubstantial. This is the basis for defendant's Free Exercise argument.

In *Abington, supra* at p. 223, it was said:

> "Its [The Free Exercise Clause] purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."

Defendants herein have not shown that the order to cease and desist issued by the State Board has the coercive effect of preventing any or all pupils from following the requirements of their respective religious doctrines.

> "While I do not question the judgment of experienced educators that the challenged practices may well achieve valuable secular ends, it seems to me that the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice." Brennan, J., *Abington, supra*, 374 U. S. at 281.

In other words, to succeed in showing that Free Exercise rights compellingly outweigh Establishment dangers, it

must be clearly shown that the conscience of the one who asserts the right demands of him as an inexcusable religious duty, the performance of a positive act, which can only do harm to him if not done and will not infringe upon the security or freedom of others. See Clark, "Guidelines for the Free Exercise Clause", 83 *Harv. L. Rev.* 327, 363 (1969), wherein all important Free Exercise cases are considered.

Is the Netcong program vital and essential to the success of its intended secular goals? Would a discontinuance of the program result in the inculcation of irreligion through the public school system? Would its discontinuance produce a dilution of the religious beliefs of those who attend the Netcong schools? Is the Netcong program the only available method of conveying to our youth a sound moral conscience and of teaching truthfulness and other laudable virtues? Do the Local Board, the superintendent and the principal of Netcong High School truly believe that they and their teachers are completely unqualified and ill-equipped to teach their students to think about right and wrong without pinning the school curriculum closely to one or another reading from the Bible or other expression of ordained truth? The answer to each of the foregoing questions is in the negative. There is not an iota of proof before this Court to support even a partial affirmative answer to any of the foregoing questions. If the Netcong program is related to goals such as morality, truth, honesty and kindness, which goals should be impressed firmly in all, then such ideals should be achieved by all, theists and non-theists, children and parents, pupils and educators, teachers, principals and school board members alike.

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It is concluded that the Netcong program and the implementation thereof violates the First Amendment, and that the defense of *Free Exercise* as set forth in the case at bar is untenable.

An injunction will issue forthwith, enjoining and restraining defendants from a continuation of the program and any implementation thereof. Order to be submitted. No costs.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1899

BOARD OF EDUCATION OF NEWTON, NEW JERSEY, *et al.*,

Petitioners,

vs.

STATE BOARD OF EDUCATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

Counter-Statement of Question Presented

Is a governmentally sponsored religious exercise held on school premises immediately prior to the opening bell each morning violative of the Establishment Clause of the First Amendment to the United States Constitution as interpreted by the Court in *Engel* v. *Vitale*, 370 U. S. 421 (1962) and *School District of Abington Twp.* v. *Schempp*, 374 U.S. 203 (1963).

Counter-Statement of Case

In response to a request by the State Commissioner of Education, the Attorney General of New Jersey on November 24, 1969, issued a formal opinion declaring the school prayer program instituted by the Board of Education of Netcong to be violative of the Establishment Clause of the First Amendment to the United States Constitution. After unsuccessful attempts by the Commissioner and the State Board of Education to cause the cessation of the prayer program, a complaint was filed in the Superior Court, Chancery Division, to obtain a judicial declaration of the unconstitutionality of the program and to enjoin its implementation. At that point the parties, each of whom was represented by counsel, entered into an Agreed Stipulation of Facts; the matter was considered on cross motions for summary judgment, the prayer program declared to be unconstitutional, and an injunction was issued.

After an appeal had been taken, petitioners filed a substitution of attorney (A41a).[1] On April 21, 1970, the newly substituted attorney, who represents petitioners herein, made a motion before the Superior Court, Appellate Division to settle the facts upon which the appeal was based and, in effect, to change the stipulation upon which the case had been tried (A33a). On May 7, 1970, the Appellate Division denied petitioners' motion to change the stipulation upon which the case had been tried below (A40a). Accordingly, when the case was subsequently certified to the New Jersey Supreme Court without argument in the Appellate Division, the only facts considered by that court were those contained in the stipulation.

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[1] A—a refers to the appellants' appendix filed in the Appellate Division.

This stipulation differs in certain respects from the facts presented by petitioners' petition for writ of certiorari to this Court. For example, paragraph four of the stipulation is completely missing from the facts presented in petitioners' petition. Paragraph four reads as follows:

> "4. On September 2, 1969, the Board of Education of Netcong enacted the following resolution:
>
> 'That the Superintendent be instructed by the Board of Education to institute prayers in the Netcong schools, forcing no student to pray if unwilling but denying no student the right to pray, details to be worked out by the Board of Education.'
>
> It was further resolved that:
>
> 'Members of the clergy from the communities of Netcong and Stanhope be invited to meet with representatives of the Board of Education and compose a suitable prayer for the Board's consideration. In the interim, the Superintendent is instructed to institute 30 seconds of silent meditation until the Board takes further action." (Ab2).[*]

In addition, paragraph seven of the Agreed Stipulation (Ab4), describing the manner in which the prayer program was implemented has been considerably altered in the petition. Paragraph seven of the stipulation reads as follows:

> "7. The implementation of the resolution has occurred in the following way: At 7:55 a.m. in the

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[*] Ab— refers to the appellants' brief filed in the Appellate Division.

Netcong High School gymnasium, prior to the formal opening of school, the students who wish to join in the exercise either sit or stand in the bleachers. A student volunteer reader, assigned by the principal on a first come, first served basis, then comes forward and reads the 'remarks' of the chaplain from the Congressional Record, giving the date, volume, number and body whose proceedings are being read. The selection of material to be read is made by the volunteer reader with the approval of the high school principal in a purely ministerial fashion to insure that the material used complies with the evinced purposes of the Board's resolution. The volunteer reader is free to add remarks concerning such subjects as love of neighbor, brotherhood and civil responsibility, etc. At the conclusion of the reading, the students are asked to meditate for a short period of time either on the material that has been read or upon anything else they desire."

This paragraph sets forth all of the agreed factual circumstances surrounding the implementation of the religious exercise program in question.

Accordingly, it is respectfully submitted that since the stipulation was agreed upon by the parties and was the only factual material before the trial court and the Supreme Court of New Jersey, the petition for a writ of certiorari must be considered on the basis of those facts not upon the hypothetical facts set forth in the petitioners' statement of the case.

ARGUMENT

Certiorari should be denied because the religious exercise program which the Court below found to be in violation of the First Amendment to the United States Constitution is not meaningfully different from the religious programs declared unconstitutional by this Court in *Schempp* and *Engel*.

The Supreme Court of New Jersey, in affirming the decision of the lower court which invalidated the Netcong school prayer exercise on Establishment Clause grounds, succinctly stated the nature of this case:

> "We find no meaningful difference between the program involved in this case and the programs which the United States Supreme Court held to violate the Establishment Clause of the First Amendment in *Engle* v. *Vitale*, 370 U. S. 421, 8 L. Ed. 2d 601 (1962), and *School District of Abington Twp.* v. *Schempp*, 374 U. S. 203, 10 L. ed. 2d 844 (1963). The judgment is therefore affirmed." (P2a).

In *Engel*, 370 U. S. 421 (1962) the State of New York adopted a voluntary program of denominationally neutral prayer in the public school classrooms. This Court found the program to be in violation of the Establishment Clause because it placed the power, prestige and financial support of government behind a religious exercise, notwithstanding the prayer was nondenominational and that those students who wished to do so could remain silent or leave the room.

The statute considered by this Court in *School District of Abington Township* v. *Schempp*, 374 U. S. 203 (1963) provided:

> "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." 374 U. S. at 205.

As in *Engel*, this Court declared:

> "Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools." 374 U. S. at 223.

This Court therefore held the program to be in conflict with the First Amendment, even though participation was voluntary, since voluntariness is irrelevant to a violation of the Establishment Clause.

It is respondents' position that the Netcong exercise falls squarely within the reasoning of *Schempp* and *Engel*, and that the Establishment Clause in this context has no meaning if it does not proscribe a religious exercise sponsored at school by government. When tested against the rationale of the school prayer cases, the Netcong program emerges as a clear violation of the Establishment Clause.

On September 2, 1969, the petitioner Board of Education enacted a resolution to the effect that "the Superintendent [of schools] be instructed . . . to *institute prayers*

in the Netcong schools" (emphasis added). On September 10, 1969, the Board rescinded the resolution of September 2, 1969 and enacted another resolution which provided in part for a period prior to the opening of school for "the free exercise of religion." On September 16, 1969, the Board enacted the following:

> "Be It Resolved that the Superintendent of Schools be *authorized, empowered and directed* to implement the resolution creating a period for the free exercise of religion in whatever manner, in the exercise of his discretion, he considers best under the circumstances." (Emphasis added.)

Thus, this admittedly religious exercise has been superimposed upon the public school system solely by virtue of governmental action. It would not exist but for the resolution of the Board of Education creating it and directing school officials to implement it. It is in no sense a spontaneous outpouring on the part of the students at Netcong High School, but is a carefully constructed program carried out by order of the Board, on school premises, with the assistance of the principal. In other words, it is a religious exercise required to be held by government and as such contravenes the provisions of the First Amendment.

Plaintiffs rely on the voluntary nature of the exercise and the fact that it is held in the gymnasium to free the program from the proscriptions of the First Amendment. Although voluntariness is a critical consideration in a Free Exercise case, it is clearly irrelevant to a claim based upon the Establishment Clause. In both *Schempp* and *Engel*, the observance which was declared unconstitutional was made voluntary through the use of an excusal procedure, and in both cases this Court rejected petitioners' contention:

> "Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. See *Engel* v. *Vitale*, *supra* (370 U. S. at 430)." *School District of Abington Twp.* v. *Schempp*, 374 U. S. at 225.

Petitioners here claim a distinction in that the student at Netcong must take the affirmative initiative to attend the service, whereas, in *Schempp* and *Engel* there was a negative burden of electing not to participate. In other words, what is involved here is a more elaborate form of pupil excusal. But, whether the burden of avoidance is positive or negative is inapposite in an Establishment Clause case. The real issue is not whether a child is compelled to attend the service, or with what ease he may avoid it, but only whether the service is officially sponsored by the government. Here, the Board of Education of Netcong resolved to impose upon the school system a religious exercise period and directed compliance therewith by school officials. The service is held on school grounds, with the principal approving the selection of materials and assigning volunteer readers. In other words, the government has participated in, sponsored, and in fact superimposed a religious exercise on the public education structure. This clearly places the power, support, and prestige of government behind a religious exercise in contravention of the Establishment Clause. In this situation voluntariness and excusal have no meaning: As the Supreme Court of New Hampshire recently noted:

> "It is clear that if government prescribed an exercise the primary purpose of which is religious, the establishment clause is violated even though ob-

servance on the part of the students is voluntary." *Opinion of the Justices*, 223 A. 2d 161, 163 (1967).

Petitioners cite *Reed* v. *Van Hoven*, 237 F. Supp. 48 (W. D. Mich. 1965) and *Stein* v. *Oshinsky*, 348 F. 2d 999 (2nd Cir. 1965) for the proposition that federal courts have declared exercises similar to those at Netcong valid subsequent to *Schempp* and *Engel*. But the court in *Reed* specifically declined to rule upon the constitutionality of its own plan and in fact stated: "This approach is by no means a final judgment of the court, nor should it be taken as a preliminary indication of a final judgment". 237 F. Supp. at 56. Further, recognining that its plan was far from secure as against the proscriptions of the First Amendment, the court went on to say:

> "However, even should the program successfully escape the prohibitions of the Establishment Clause, as administered it may possibly result in an abridgement of the rights of free exercise . . ." 237 F. Supp. at 57.

Thus *Reed* is, in fact, nothing more than an interim order which even in the eyes of the issuing court did not adjudicate the merits of the claim before it. As such, it is hardly a precedent for petitioners' cause here. Of *Stein* v. *Oshinsky* no more need be said than that it concerned a spontaneous outpouring of student-initiated prayers involving neither support, direction or even the slightest connection with school officials. Assuming, *arguendo*, the relevance of *Reed* and *Stein*, even petitioners concede that they rest on the rationale of the dissenting opinion in *Schempp* (Pb11).

What is more significant than the decisions in *Reed* and *Stein* is the fact that there has been very little litigation

involving school prayer issues since this Court's decisions in *Engel* and *Schempp*. This indicates that while the decisions may have generated some public controversy, there has been little doubt legally as to their meaning and intent and that petitioner's allegations regarding confusion and uncertainty are unfounded.

Finally the issue confronting the Court in this matter is constitutionally indistinguishable from that considered in the decisions in *Schempp* and *Engel*. In this respect, it is well established that where cases before the Court are in all essential particulars like other cases previously decided, the Court should invoke the doctrine of *stare decisis*. *United States* v. *Hatch*, 154 U. S. 596, (1874). Unless clearly convinced of a former error of its decision on a constitutional matter, this Court should seek continuity in its decisions regarding the United States Constitution. *Smith* v. *Allwright*, 321 U. S. 648 (1943). Accordingly, it is respectfully submitted that since the issue presented in this case is constitutionally indistinguishable from the issues presented in *Schempp* and *Engel*, it should be resolved on the basis of the decisions in those cases.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

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